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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 366

AUGUST J. KLAPPROTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

August J. Klapprott respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, decided July 20, 1950. The Third Circuit affirmed the judgment of the United States District Court for the State of New Jersey, and found against petitioner in an effort to obtain a hearing on the merits of his case relating to a complaint filed by the United States of America to cancel and revoke his certificate of citizenship. A default judgment was entered July 17, 1942 against petitioner revoking and cancelling his certificate of citizenship.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is set forth at Appendix 482, and the Findings of Fact and Conclusions of Law of the District Court are set forth at 445a to 462a.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28U.S.C.R. 347).

QUESTIONS PRESENTED.

1. Did the United States Court of Appeals for the Third Circuit err in affirming the District Court in its Findings of Fact and Conclusions of Law as follows:

(a) That petitioner *knowingly, voluntarily* and *intentionally permitted entry of the default judgment cancelling his certificate of citizenship.*

(b) That Petitioner's statement contained in paragraph 4 of his petition (App. 14a) was false and which read as follows:

> "In view of his poor physical condition, petitioner was unable to get around very well and since he was also in very poor financial condition petitioner had no money with which to retain a lawyer to represent him."

(c) That petitioner's statements were false when he said, he had written a letter to the American Civil Liberties Union asking for legal assistance, and which letter he contended was taken by an Agent of the Federal Bureau of Investigation, and that at the time petitioner was working on a draft of an answer to the complaint which he was unable to complete because of arrest by agents of the F. B. I.

(d) That petitioner's conversations with Court appointed counsel in the criminal case in New York City relating to his denaturalization case were false.

(e) That the admission of testimony of F. B. I. agents relating to petitioner's political views and other unrelated matters was proper.

(f) That the harrassing criminal trials to which petitioner had been subjected, along with his long period of confinement in jail did not so preoccupy his mind and undermine him physically and mentally so as to preclude him from doing more than he did initially in seeking to defend the denaturalization proceeding.

STATEMENT OF FACTS.

A complete statement of facts appears in this Honorable Court's opinion in the case of *Klapprott* v. *U. S.*, decided January 17, 1949, 325 U. S. 601, 93 L. ed. 266. The foregoing reference as to details is made to preclude repetition of undisputed facts and with which facts this Honorable Court is familiar as result of the detailed consideration of the case on a prior occasion. After hearing argument on the first petition, this Court (App. 72a) in an opinion delivered by Mr. Justice Black and in which Mr. Justice Douglas, Mr. Justice Murphy, Mr. Justice Rutledge and Mr. Justice Burton concurred in holding that the District Court erred in dismissing the petition to set aside the default judgment entered against Petitioner and the Court of Appeals erred in affirming the District Court. The judgment was accordingly reversed and the cause remanded to the District Court with instruction to set aside the judgment and petitioner be granted a hearing on the merits (App. 86a). Subsequent thereto the Government filed a motion to modify the judgment of this Court and on April 4, 1949 the amendment was granted and the following judgment was entered (App. 102a):

> "On consideration of the motion of respondent to modify the judgment of this Court in this case.
>
> "*It is ordered* by this Court that the said motion be, and it is hereby granted. The judgment announced January 17, 1948, reading as follows: 'The judgments accordingly are reversed and the cause is remanded to the District Court with instructions to set aside the

judgment by default and grant the petitioner a hearing on the merits raised by the denaturalization complaint' is amended to read. 'The judgment of the Court of Appeals is reversed and the cause remanded to the District Court with directions to receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate the default judgment entered in the denaturalization proceedings'."

Mr. Justice Black, Mr. Justice Douglass, Mr. Justice Murphy and Mr. Justice Rutledge dissented from the modification of the Judgment.

The amended judgment placed the burden of proof on petitioner to prove the truth or falsity of the allegations contained in his petition prepared 4½ years after the occurrence of certain matters and while he was in distress and fear of immediate deportation.

The case was set for hearing in the U. S. District Court, Newark, New Jersey, on June 13, 1949 before District Judge Arthur F. Lederle sitting by special designation. Prior to taking testimony, counsel for petitioner and the United States Government entered into a stipulation (App. 109) agreeing upon the majority of facts in the petition. On June 23, 1949 the Court, after hearing the evidence, filed Findings of Fact and Conclusions of Law, and an order overruling Klapprott's petition to vacate the default judgment (App. 445a). A motion to modify the Findings of Fact and Conclusions of Law was filed July 1, 1949 (App. 464a) and on July 15, 1949 an order was entered by the District Court overruling the motion (App. 474a). An appeal was noted July 18, 1949 to the United States Court of Appeals for the Third Circuit (App. 475a) and argued March 21, 1950 and decided July 20, 1950. The judgment of the Lower Court was affirmed.

REASONS FOR GRANTING THE WRIT.

1. The allegation in Klapprott's petition that the District Court found to be false, were the result of minute consideration of inconsequential matters and an oversight of the fact that Klapprott's petition in main was proven to be true.

2. The particular variances in the petition were caused by the great lapse of time between the date of occurrence of the facts alleged, and the date the petition was executed by Klapprott while confined on Ellis Island awaiting imminent deportation.

3. That petitioner proved beyond cavil that the principal allegations contained in the petition were true.

4. The evidence does not support the conclusion that Klapprott knowingly, voluntarily and willfully permitted the entry of the default judgment cancelling his certificate of citizenship.

5. Petitioner's unlawful confinement in jail for approximately *four and one-half years* appears to have been overlooked, when the District Court found that the harrassing criminal proceedings which Klapprott endured did not so preoccupy his mind to such an extent to preclude him from being guilty of wilful neglect in not proceeding at an earlier date in an effort to set aside the default judgment cancelling his certificate of citizenship.

PRAYER FOR WRIT.

Wherefore your petitioner prays for a writ of certiorari to be issued under the seal of this Court directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause, so that it may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed and the petitioner granted such other and further relief as may seem proper.

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No. 366

AUGUST KLAPPROTT, *Petitioner,*

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SUMMARY OF ARGUMENT.

1. Certiorari should issue to correct the judgment of the United States Court of Appeals for the Third Circuit denying Petitioner a hearing on the merits of the case.

2. Certiorari should issue to correct the Findings of the District Court and affirmed by the United States Court of Appeals for the Third Circuit, whereby certain allegations contained in August Klapprott's petition were found to be false.

3. Certiorari should issue to correct the finding of the District Court, that petitioner *knowingly voluntarily* and *intentionally permitted entry of the default judgment cancelling his certificate of citizenship.*

4. Certiorari should issue to determine whether the Court below erred in not finding that the harassing criminal trials to which petitioner had been subjected along with his long period of confinement in jail, so preoccupied his mind and undermined him physically and mentally, that he was precluded from doing more than he did initially in seeking to reopen the denaturalization case.

5. Certiorari should issue to correct a definite abridgement of petitioner's Constitutional rights and to make it possible for him to have his day in Court.

Argument.

IT IS INCONCEIVABLE TO PETITIONER THAT THE UNITED STATES COURT OF APPEALS AFFIRMED THE FINDING OF FACT OF THE DISTRICT COURT NO. 55 (APP. 461A) HOLDING THAT:

> "THE DEFENDANT, KLAPPROTT, KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY FAILED TO DEFEND THE ABOVE-ENTITLED ACTION AT ALL TIMES UP TO THE DATE OF THE DEFAULT JUDGMENT, AND FOR MANY YEARS THEREAFTER."

The foregoing finding, we submit, is not supported by a broad consideration of the evidence considering the conditions that existed on May 15, 1942, the date that Klapprott was served with the complaint to cancell his American Citizenship.

The District Court's finding of fact No. 26 concededly admits petitioner's ill health and we are constrained to quote the finding in its entirety (App. 451a):

> "During the spring of 1942, defendant was seriously ill, suffering from stomach ulcers, and was confined to Christ Hospital, Jersey City, from March 8th to March 26, 1942, which illness endangered his life and required two blood transfusions. Upon his release from the hospital, petitioner was in very poor health, as a result of which he was advised to live in a place where he could receive proper rest and relaxation. Since petitioner was in very poor financial circumstances and in view of his affiliations with the German-American Bund, which was at that time the owner of a recreation camp at Andover, N. J., known as Camp Nordland, petitioner made arrangements to live at Camp Nordland until such time as his health improved."

The Court in arriving at the conclusion that Klapprott *knowingly, voluntarily,* and *intentionally* permitted entry of

the default judgment was in error. The evidence demonstrates that approximately eight (8) days prior to the date an answer was due to the complaint, that petitioner was *indicted, arrested and removed to New York City.* He was held under the excessive bond of TWENTY-FIVE THOUSAND ($25,000.00) FOLLOWING ARRAIGNMENT. It must be conceded that at the time of arrest Petitioner had EIGHT DAYS in which to enter an appearance or file an answer to the complaint, and which we submit was ample time under normal conditions. From date of arrest on July 7, 1942 to July 17, 1942, the date the default was entered, Klapprott was faced with the following conditions:

1. On July 7, 1942 he was arrested by two agents of the F. B. I. and removed from his residence at Camp Nordland. (App. 227a)

2. He was taken to Newark, N. J., grilled at the headquarters of the F. B. I., appeared before the U. S. Commissioner and was held under $10,000 bail. After spending two nights at the Hudson County Jail, Jersey City, N. J. (App. 162 A), he was removed to New York City chained to two other defendants indicted in the case of *U. S.* v. *Keegan, et al.,* 141 F. 2d 148.

3. Petitioner was incarcerated in the Federal Detention Headquarters, New York City and subsequently arrainged. He entered a plea of *not guilty* to the charge of conspiracy to violate the Selective Service Act and at which time his bail was raised from $10,000.00 to $25,000.00. At the time of entry of the default judgment in Newark, N. J., Klapprott was in jail in New York City.

May we respectfully ask, under the circumstances, what could an individual so situated as was Klapprott have reasonably done within a *ten-day period* between July 7, 1942, the day of his arrest, and July 17, 1942, the day on which the default judgment was entered? Can it be argued that Klapprott, literally torn from his family, indicted on a serious charge that carried with it *a maximum five-year penalty,* removed from his home in New Jersey and held under $25,000.00 bail, could have possibly been in a physical

and mental condition to think clearly and meet the unsurmountable barriers that faced him?

Past experience of persons trained in the law most certainly leaves us all in accord, that waiting until the last day prescribed by law to file an answer to a civil complaint should not be the subject of criticism, and in this case Klapprott had a maximum of eight days at the time of arrest to file an answer or appear in the U. S. District Court in Newark, N. J.

Is it fair to conclude, that had petitioner not been indicted in New York State and arrested on July 7, 1942 and removed to New York City, that he would not have taken steps within the remaining period of eight days to have entered his appearance, or answered the complaint? The Government must concede that if petitioner had appeared in proper person, it would have precluded a default judgment being entered without giving Klapprott three days' notice of the proceeding, (Rule 55 (b) (2)), Rules of Civil Procedure.

No matter what reason the District Court had for finding petitioner *knowingly, voluntarily* and *intentionally permitted* the *default judgment* to be entered, we most respectfully urge it should have been cast aside and disregarded in view of the foregoing facts.

Can it be said that the Government, in depriving Klapprott of his freedom in the remaining eight days to answer the complaint acted fairly in taking a default judgment without notice, or affording him the opportunity to appear?

Can it be denied by the Government well knowing that Klapprott was incarcerated in New York City, and without the jurisdiction of the State of New Jersey, that the authorities should have notified Klapprott or his immediate custodian in New York that a default judgment was to be entered against him on July 17, 1942, cancelling his citizenship? We have continually raised the foregoing points and the Government has failed to come forward with an answer in reply. We are confident, if the District Court, in Newark, had been apprised of the fact of Klapprott's helpless con-

dition and inability to appear to contest the default judgment, the Court would have ordered his appearance.

It is respectfully urged that the foregoing facts constituted *an Abridgement of petitioner's Constitutional rights* when his citizenship was removed by the Government as the result of a default, when at the same time the Government well knew that petitioner was confined in New York City and helpless to take any action to defend himself.

We do not feel an obligation to go beyond the previous facts recited in an effort to show that finding of fact No. 55, that *Klapprott knowingly, voluntarily,* and *intentionally permitted entry of the default judgment, was error.* The importance, however, of the issues involved make it mandatory to do so.

Prior to petitioner's arrest he was questioned many times by agents of the F. B. I. and it must be admitted that Klapprott was emotionally upset when questioned about the denaturalization proceeding. Gene D. Weisiger, an F. B. I. agent testifying for the Government on direct examination said, when he discussed the subject of Klapprott's denaturalization, petitioner became upset and cried (App. 278a). When the subject was changed the witness said he spoke intelligently (App. 278a)—"THEN WHEN WE GOT BACK TO DENATURALIZATION AGAIN HE BECAME UPSET AGAIN.

How the District Court could have reached the conclusion, that Klapprott *KNOWINGLY, VOLUNTARILY* AND *INTENTIONALLY PERMITTED ENTRY OF THE DEFAULT JUDGMENT IS BEYOND OUR COMPREHENSION.*

On cross-examination of Agent Weisiger (App. 283a), testified relative to Klapprott's mental condition:

"Q. And he was very upset?

A. JUST WHILE WE WERE TALKING ABOUT THIS ONE SUBJECT.

Q. AND HE STARTED TO CRY?

A. YES.

Q. And that was when you were talking about the possibility of him losing his American citizenship?

A. Yes, yes."

Does the foregoing testimony reflect the attitude of a man who cared little about his American citizenship and was willing to *knowingly, voluntarily* and *intentionally permit is to be cancelled by default judgment?* The answer must be "NO". Klapprott's attitude reflects that of a sick and weary man who was caught in a mesh of public hatred and resentment because of his German heritage and the fact he foolishly became involved in an executive capacity in the German-American Bund. This man was so financially impoverished and physically incapacitated that his mind and spirit were broken and he was literally reduced to a condition of helplessness.

Robert A. Tucker, an F. B. I. Agent, who accompanied Agent Kleinkauf when Klapprott was arrested, was asked on cross-examination (App. 336a):

> Q. But you never heard Klapprott say that he never intended to defend his denaturalization case?
> A. No, I didn't."

A review of the testimony of Klapprott and the F. B. I. agents should convince one beyond doubt, that petitioner did not *knowingly, voluntarily* and *intentionally permit the default judgment to be entered.*

On direct examination, Charles F. Watson, an F. B. I. agent testifying for the Government, was asked (App. 267a).

> "Q. Now, in the course of your conversation with Mr. Klapprott did you discuss the naturalization action that was taken then pending against him, the denaturalization action?
> A. The only thing *I recall* in that connection was that during the course of our conversation Mr. Klapprott mentioned that, well HE MENTIONED HIS FINANCIAL CONDITION AND SAID FOR THAT REASON HE WOULDN'T BE ABLE TO CONTEST THE DENATURALIZATION PROCEEDINGS WHICH HAD BEEN INSTITUTED."

On cross-examination the witness stated (App. 269a):

> "Q. As I understand, the only statement he made to you about the denaturalization case that he said because of the lack of finances he did not feel he would be able to defend it.

A. *That is correct, sir.*

Q. But he never said to you he did not care to defend it?

A. No, I don't recall him ever making that statement.

Q. He never said he would not defend it?

A. *I NEVER HEARD HIM MAKE A STATEMENT LIKE THAT."*

In closing this one phase of argument we ask this Honorable Court to consider the existing conditions that faced Klapprott at the time.

Prior to May 15, 1942, when he was served with the petition Klapprott was head of the German-American Bund in the State of New Jersey, and it appears (App. 218a) his one "hatred" was communism. There was an inherent public hatred and prejudice against this man and his associates and that fact is aptly demonstrated by past proceedings and public demonstrations during the war period and thereafter. We will discuss in further portions of this petition other phases of testimony that should aptly demonstrate Klapprott never *knowingly, voluntarily* and *intentionally* permitted the default judgment to be entered.

In arriving at the conclusion that Klapprott *knowingly, voluntarily* and *intentionally* permitted his citizenship to be cancelled, we respectfully urge that the District Court failed to take into consideration the circumstances surrounding the most devastating *war of all history and which created a feeling of resentment by all Americans against any person who might have expressed a sympathetic feeling towards Germany prior to our entry in the war even though such feeling was created by an inherent hatred for communism.*

THE SECOND PHASE OF ARGUMENT THAT WE WISH TO STRESS IS THAT PORTION OF KLAPPROTT'S PETITION (APP. 14A) AS FOLLOWS: "• • • • *AND SINCE HE WAS ALSO IN VERY POOR FINANCIAL CONDITION PETITIONER HAD NO MONEY WITH WHICH TO RETAIN A LAWYER TO REPRESENT HIM.* (App. 14a)."

THE DISTRICT COURT'S FINDING OF FACT NO. 27, FOUND THAT PETITIONER'S STATEMENT,

THAT HE HAD NO MONEY TO RETAIN A LAWYER TO HELP HIM WAS FALSE, AND THE COURT ADVANCED AS A BASIS FOR SUCH STATEMENT THE FOLLOWING (App. 452a): *"PRIOR TO JULY 7, 1949, HE SOLD THE STATION WAGON FOR $200.00."*

When one analyzes the prevailing world situation on May 15, 1942, the date Klapprott was served with the complaint, we find a man who had been the acknowledged head of the German-American Bund for the State of New Jersey and which organization's past activities had aroused public hatred. On that date, the United States was plunged headlong into the most devastating war of world history, with Germany enjoying apparent success.

With the existing war hysteria, public antipathy and hatred for Garmany can one reasonably assume that Klapprott could have obtained counsel in Newark, N. J., or elsewhere in the United States to have defended him for the meager sum of $200.00? We respectfully urge that petitioner could not have obtained counsel at that time, and particularly for $200.00 and which the District Court by its finding appears to indicate *was a sufficient amount to compensate an attorney to defend Klapprott.*

Just what did he do with the $200.00 in question? The direct examination of petitioner answers that question (App. 157a):

> "Q. Did there come a time when you sold that station wagon?
> A. Yes.
> Q. When?
> A. I sold the station wagon about two weeks, two weeks I guess it was before I was arrested.
> Q. What did you receive for the sale of it?
> A. About $200.00.
> Q. And what did you do with that money?
> A. I gave that to my Missus to—— in case something should happen to me; I told her she would have a little money."

After appearing before the Federal Grand Jury considering the case of *U. S.* v. *Keegan, et al.*, 141 F. (2d) 148, peti-

tioner sensed he was going to be indicted and being without funds, did the one thing that was instinctly human, i.e., he disposed of his only asset, a station wagon, and gave the meager sum of $200.00 to his wife for future support of her and an infant baby daughter. Is petitioner to be critized for that act? He was without funds, living on charity, ill and unable to work and when sensing he was to be torn from his family, at least attempted to furnish them with some security.

The District Court's finding of this one fact should be sufficient for this Honorable Court to grant this petition. The foregoing facts are such that we should not be compelled to offer further argument. We are however contrained to set forth facts relating to Klapprott's financial condition prior to arrest and which stands uncontradicted.

1. On December 11, 1941 Klapprott's employment ended and prior thereto he had earned $35.00 per week and for the last two weeks of employment earned $40.00 per week. At the time he had no bank account (App. 147a) nor did his wife.

2. Following discontinuance of employment, petitioner never again became employed (App. 148a) until his release from Ellis Island in 1947.

3. In 1942, Klapprott's residence in Union City, N. J., was rented by him for $35.00 per month (App. 147a) and after release from Christ Hospital his landlord returned one-half months rent when petitioner moved to Camp Nordland to recuperate (App. 193a) *and where he lived in a house rent free* (App. 154a).

4. At the time, he had no money, and prior to going to Camp Nordland lived on contributions of friends (App. 154a).

5. During petitioner's stay at Camp Nordland he and his wife were unemployed (App. 156a-157a) and the records of Christ Hospital did not reveal they had been compensated for the hospitalization of Klapprott during the month of March, 1942 (App. 197a).

6. The District Court upon questioning Dr. Bergmeier, Klapprott's physician (App. 189a) was informed by the doctor that so far as he knew he had never received any compensation for services rendered to Klapprott during his illness.

7. When petitioner, as result of a Government subpoena was required to make a trip to Hartford, Connecticut, to appear before a Federal Grand Jury he was without funds *and the authorities advanced him the sum of ten dollars* (App. 202a).

8. During petitioner's residence at Camp Nordland he received small contributions from a Mr. Fitting to pay for groceries (App. 156a).

9. At the time of Klapprott's arrest, July 7, 1942, Charles E. Kleinhauf, an F. B. I. agent, testified as follows relative to petitioner's finances (App. 312a):

> "Q. Did he have any money on him at all when he was arrested?
> A. I don't recall. If he did it was very little, as I resall.
> Q. How much would you say it was?
> A. Well, I can't say, but I am sure it wasn't over possibly a dollar or two.
> Q. A couple of dollars?
> A. Yes, sir.
> Q. Did your search of the house reveal any money in the house?
> A. No."

The testimony in this case can create no inference other than the District Court found petitioner's statement, that he had no money with which to retain a lawyer to represent him "as being false was arrived at *on the sole basis that in the latter part of June 1942 he sold a station wagon for $200.00 and gave the money to his wife* (App. 157a).

We ask the Government in all fairness:

(a) Was the sum of $200.00 such an amount for Klapprott to retain counsel and adequately defend himself in the denaturalization case?

(b) Was such a sum sufficient to finance the cost of litigation which faced petitioner during a period of war hysteria?

(c) Does the Government contend that Klapprott should have denied his wife and child the sum of $200.00 to provide them with bare necessities of life, or should he have attempted to use that money to retain counsel? On the face of the record, is it patent that the sum of $200.00 could not possibly be considered as ample funds to retain an attorney and finance a defense in a case of this nature?

We have referred to the hysteria, public antipathy and hatred for Germany that existed in 1942, and at which time petitioner should have had counsel to defend him. We feel duty bound to call to the attention of this Honorable Court the public antipathy and feeling against Klapprott that still prevailed in January, 1947. *On January 27, 1947* at the time of Klapprott's hearing on his petition to vacate the default judgment (App. 27a) certain organizations appeared in Court through their counsel in opposition to Klapprott's pettion. They were premitted by the Court to appear *Amicus Curiae.* We feel that intervention is of such importance to show the feeling that existed against Klapprott on January 27, 1947.

> "MR. BRESLIN: May I interrupt, if your Honor please, to ask that my appearance be noted, and also other counsel? And I ask permission of your Honor that various organizations who are represented here by counsel be permitted to intervene in this matter as amicus curiae.
>
> THE COURT: The only difficulty we are going to have with that is this: Now, the Court has no objection if clients whom you represent are of the opinion that they want to appear amicus curiae, but the only thing about that, we should restrict it to a counsel upon whom the organizations can agree.
>
> MR. BRESLIN: I think we have done that.
>
> THE COURT: In other words, I can't have the record cluttered with twelve or thirteen or fourteen amicus curiae because I would have that many briefs, probably all covering the same subject matter.

MR. BRESLIN: I think we have anticipated some of that, your Honor, we realize that and we wish to conform with an orderly procedure.

THE COURT: That is the idea.

MR. BRESLIN: I represent the Catholic War Veterans, I am the Judge Advocate of the Catholic War Vets of the State of New Jersey, who are organized. We have a list here of these gentlemen, who are lawyers and who appear for these organizations, and I wondered if I could appear for them and they would appear with me?

• • • • • • •

THE COURT: All right, that brings us back now to United States of America vs. August Klapprott.

MR. BRESLIN: With your Honor's permission and in response to your Honor's suggestion, the various counsel representing the various war veterans' associations have agreed that myself, William V. Breslin, will appear as the attorney of record so that there will not be a lot of duplication and in the interest of orderly process.

However, I would like it to appear that I appear on behalf of these various other counsel and their committees.

THE COURT: They may appear.

• • • • • • •

MR. BRESLIN: I might say, your Honor, I think it is wonderful that we veterans so many of us, can agree because we have all agreed to that effect. May I note them on the record?

THE COURT: Yes you may note them on the record now, if you want. (App. 32a)

MR. BRESLIN: Yes, I would like to. William V. Breslin, appearing for all of these:

HERBERT GLADSTONE, as Counsel for the American Veterans Committee, New Jersey State Department.

R. GRAHAM HUNTINGTON, American Legion State Department.

J. R. POLLATCHEK, AMVETS, State Department.

JACK J. SINGER, Disabled American Veterans of the State and also the National Disabled American Veterans.

CHARLES BECKER, State Department, Veterans of Foreign Wars.

DORIE WORTH, Jewish War Veterans.
LOUIS GACH, Marine Corps League.
CAPTAIN FRANK BOEHLER of the Officers Reserve."

If the foregoing veterans' organizations felt duty bound to oppose the action of Klapprott on January 27, 1947 in in his attempt to regain his American Citizenship, just what must the feeling have been on *July 17th, 1942 the date the default was entered.* It is urged that the District Court was in error when *it found as false* the statement of petitioner that "HE WAS ALSO IN VERY POOR FINANCIAL POSITION AND HAD NO MONEY WHICH TO RETAIN A LAWYER TO REPRESENT HIM. (App. 452a)

THE THIRD PHASE OF ARGUMENT IS IN ANSWER TO THAT PORTION OF THE DISTRICT COURT'S FINDING OF FACT NO. 27, (App. 451a) RELATING TO THE ALLEGATION IN PARAGRAPH 4 OF THE PETITION THAT;

> "In view of his poor physical condition petitioner was unable to get around very well."

The District Court found the foregoing allegation to be false.

In affirming the District Courts finding that Klapprott's statement was false when he said "in view of his poor physical condition that he was unable to get around very well", we refer to certain excerpts of the opinion of the Court of Appeals relative to this particular point.

The Court made the following statement in support of its affirmation of the District Courts' findings on the question of Klapprott's physical condition and which we quote (App. 485a).

> "During the early spring of 1942, as the evidence showed, and as the Trial Court found, appellant was seriously ill from stomach ulcers and had been confined to a hospital from March 8th to March 26th of that year. After his release from the hospital, also as the court found, appellants' health steadily improved. On April 20th, less than a month after he left the hos-

pital, he attended a party at Backofen Tavern, Union City, New Jersey. That party, as appellant says, was given 'to welcome me back to my health.' Its date, according to appellant, coincided with Hitler's birthday. On June 9, 1942 he drove his station wagon from Camp Nordland, New Jersey, a distance of forty miles, to New York City, where he stayed over night. He went to Hartford, Connecticut, by train the following day and there testified before a Federal Grand Jury. On returning to New York he stayed overnight in that city and drove back to Camp Nordland in his station wagon the next day. F. B. I. agents who saw Klapprott on June 5, June 27 and July 7, indicated that he was at least well enough to get around and Dr. Matthews who examined him on July 7, said. 'He is not acutely ill.' A few days later he was examined by a physician in New York who testified that Klapprott 'appeared to be in good health at that time.''

Klapprott's illness was not only physical, but in addition mental. The terriffic strain he was under in 1942 created a feeling of despondency which completely undermined his morale and resistance.

Prior to hospitalization, petitioner and his wife were constantly under surveilance of the F. B. I., and agents on several occasions questioned them night and day (App. 148a) and about which petitioner testified:

"Q. Were there any other times that you recall? That's just up to March 6, 1942.

A. Then once there were about eight, eight or more than that, in my house, trying to take my Missus along as an enemy alien, and I came just home at night, it was almost twelve o'clock I think, when they still were trying to or rather my Missus was trying to find her passport and prove that she was an American citizen."

The District Court in it's finding of fact No. 26 (App. 451a) concedes that Klapprott was *seriously ill* suffering from stomach ulcers and was confined to Christ Hospital, Jersey City, from March 8 to March 26, 1942 and which illness *endangered his life and required two blood transfusions.* The Court also conceded that when Klapprott left the hospital *he was in very poor health.*

After Klapprott returned to his home following release from Christ Hospital he was obliged to remain in bed (App. 152a), and so testified:

> "Q. How long did you remain confined in bed at your home?
> A. Oh I was—— For weeks, I didn't even get out yet.
> Q. Do you recall the approximate time you did get up?
> A. Yes, it must have been in the middle of April when I first walked around."

The Court of Appeals in its opinion (App. 485) appears to give great weight, as did the District Court, to the fact that Klapprott attended a gathering in a tavern located TWO BLOCKS FROM WHERE HE RESIDED. There is no evidence that he was able to walk the two blocks, and we submit that Petitioner must have been ill and weak, when he had to go by automobile (App. 155a) and we refer to the record:

> "Q. How did you get from your house to this particular location?
> A. Some friend of mine picked me up with a car and then went there—stayed there—I stayed there about one and a half hours."

Petitioner stated at the time he was still on a diet furnished by the hospital and that he did not eat anything and only drank milk that night. To demonstrate the pressure he was under, the record shows that on that occasion a large number of F. B. I. agents came in the tavern to question the parties (App. 155a). Upon leaving the tavern the same man who had brought him drove him home and he never attended any other functions during the month (App. 156a)

If the District Court meant to infer, the fact Klapprott attended this affair was evidence that he was physically able to "get around", we submit such inference is a misconception. The Court lost sight of the fact that Klapprott had to be driven by car "TWO BLOCKS" from his home to the Tavern and "TWO BLOCKS" back to his home.

Can one conceive of a physically fit man not having walked the "TWO BLOCKS"?

The Court of Appeals in its opinion stated:

> "On June 9, 1942 he drove his station wagon from Camp Nordland, New Jersey, a distance of 40 miles, to New York City, where he stayed overnight. He went to Hartford, Connecticut, by train and then testified before a Federal Grand Jury . . ."

That was not a pleasure trip for Klapprott or a trip he desired to make. We most respectfully refer to what took place prior to the trip: Dr. Bergmeier, Klapprott's physician testified that on two occasions F. B. I. agents called him subsequent to March 28, 1942 (App. 186a) and he stated:

> Q. What was the conversation you had with the agent on the first call?
>
> A. The Agent called me if Mr. Klapprott could go to Connecticut, for a hearing of some kind, *and at the time, I refused because he had been too ill in the hospital, and that he would not be able to stand it at that time.*
>
> Q. Now you say there was a subsequent call?
>
> A. I was called again. I don't know the exact time.
>
> Q. And what was the nature of the conversation?
>
> A. He wanted to know if he could at this time go to Hartford, Connecticut, for a hearing.
>
> Q. And what did you say?
>
> A. I said I would give the permission provided he would be placed on a diet, that he would not be interviewed for a longer period of time than two hours, and would be fed, would have something to eat every two hours."

It appears that the District Court based its finding as to Klapprott's statement "that he was unable to get around," was false, on the fact that he went to Hartford, Connecticut on *June* 9, 1942. Klapprott was under subpoena to appear before two Grand Juries, and was only permitted to make the trip on June 9th, 1942 under certain conditions recited by his physician (App. 186a). Petitioner was asked on direct examination (App. 202a-203a):

"Q. Now, did there come a time that you were again requested to appear before a Grand Jury in any other jurisdiction? That's during this period of time.

A. Yes.

Q. Prior to your arrest.

A. *I think it must have been the end of June* when I had to go to New York to the Foley Square Building in New York and——

Q. And were you interviewed there?

A. And I was—for the Grand Jury hearing, see.

Q. And did those appearances before the Grand Jury affect you?

A. Yes, I got sick in New York again AND THEY HAD TO PUT ME IN THE HOSPITAL IN THE BUILDING DOWN THERE AND THEY GAVE ME SOME MEDICINE, AND AFTER RESTING FOR A COUPLE OF HOURS, THEY RELEASED ME THEN AGAIN."

If, as late as the latter part of June, 1942, Klapprott required hospitalization after testifying before a Federal Grand Jury in New York City, can it be said, he was then in such physical condition to warrant him *"getting around very well"*.

The Court of Appeals makes reference in its opinion to the examination of Klapprott by Dr. Matthews at F. B. I. Headquarters on July 7, 1942 and quoted the physician as saying "he is not acutely ill"; (App. 486) We most respectfully urge that a reading of Dr. Matthew's testimony shows that the examination must have been made in great haste.

The Doctor stated the purpose of his examination was to determine whether Klapprott was physically able to undergo questioning (App. 287a) and yet he failed to take Petitioner's *Blood Pressure, Pulse Beat or Urine Analysis.*

The physician did not say *THAT KLAPPROTT WAS NOT ILL.* HE SAID THAT KLAPPROTT WAS NOT "ACUTELY ILL". Just what the line of demarcation is between a person being "ill"; and being "acutely ill" we do not know, but the inference that can be taken from such statement is that Klapprott was suffering at the time from some illness.

In Volume 2, Words and Phrases, page 321 under the heading "ACUTE" the following appears:

> "In order to distinguish a disease as 'chronic' it is necessary that it should have been of long standing as applied to diseases of a body. 'Chronic' and 'acute' are the antithesis of each other. *An acute disease is one usually attended with violent symptoms,* while a chronic disease is deep-seated and obstinate, threatening a long continuance."
>
> *Jones* v. *Yarborough,* 2 Ala. 524, 525.

We do not contend that at the time Klapprott was examined by Dr. Matthews that he had violent symptoms, but we do maintain at the time of examination he was still a very sick man and his intestinal illness was deep seated and obstinate and threatened a long continuance and which contention is supported by later developments. It is not fair to infer that this was petitioner's only illness. He was ill of body and mind as result of what he had been through, and all of which should be afforded great weight in determining the degree of illness.

The Court of Appeals in its opinion (App. 486) stated:

> "A few days later he was examined by a physician in New York who testified that Klapprott 'appeared to be in good health at that time'."

The examination referred to was made by Dr. Michael S. Tramantana (App. 290a) and who was the physician at the Federal Detention Headquarters, New York, N. Y. Notwithstanding the statement that petitioner "appeared to be in good health at the time" the Doctor said on direct examination (App. 291a):

> "Q. All right sir, what was your finding as the result of the examination you then made?
>
> A. Well, at that time, first he made a statement that he had been suffering with ulcers and I *placed him under observation,* that is, he wasn't hospitalized but I made a note that he was placed under observation. I *thought* he had a mild anemia. And I think he presented a scar in the right lower quadrant, due to an appen-

dectomy. I recommended some therapy to help his *anemic condition*, it was mild, and I prescribed that he come into the medical office and receive some capsules every morning."

The witness went on to say he placed Klapprott on a diet of milk and eggs and a choice of the menu (App. 293a). Is it reasonable to assume that a man who appeared to be in good health at the time, would, while in jail have been placed on:

(a) *A special diet of milk and eggs and a choice of the menu.*

(b) *And be directed to come to the medical office and receive capsules every morning.*

Medical services, in the average jail are quite limited, and trivial or minor illnesses are overlooked. We submit for a prisoner to be placed on a "SPECIAL DIET" and be afforded the choice of the menu creates every indication that that person was ill, and we submit Klapprott, at that time was a very sick man.

During the trial in New York City, Klapprott complained about his illness (App. 327a).

When Klapprott was removed to Tomb's Prison, New York, prior to his trial (App. 166a), the Doctor at that prison said he should have a diet. His request to be kept on a diet continued to the time he was transferred to the Jail in the District of Columbia (App. 195a).

We respectfully urge that the Court erred in finding as false Klapprott's statement in paragraph 4 of his petition (App. 14a) "In view of his poor physical condition he was unable to get around very well * * *"

THE FOURTH PHASE OF ARGUMENT RELATES TO THE DISTRICT COURT'S FINDING OF FACT NO. 28 (App. 452a), CONCERNING PARAGRAPH FOUR OF THE PETITION REFERRING TO A LETTER AND PARTIAL ANSWER HAVING BEEN WRITTEN BY PETITIONER, AND WHICH STATEMENT THE COURT FOUND TO BE FALSE AND NOT WORTHY OF BELIEF. THE STATEMENT READS AS FOLLOWS:

"In order to obtain some legal assistance, petitioner wrote out and addressed a letter to the American Civil Liberties Union of New York, in which he explained that he had no money with which to retain a lawyer and requested that they arrange for some legal assistance for him. The letter was in petitioner's possession on the day of his arrest and was taken away from him by the Federal Bureau of Investigation, and so far as petitioner knows, it was never mailed and is undoubtedly in the hands of the United States Department of Justice. Petitioner had also drawn up a draft of an answer to the complaint and was working on it at the time of his arrest, but because of the fact that he was taken into custody, petitioner was unable to complete it and it was left at petitioner's home when he was taken away."

In reaching the conclusion that Klapprott's statement was false, and that "THE DEFENDANT'S STORY OF THE EXISTENCE OF THESE DOCUMENTS AND THEIR DISPOSITION IS NOT WORTHY OF BELIEF" (App. 453a), the District Court disbelieved Klapprott's testimony concerning the letter and answer. We reiterate, the denaturalization case was and still is the most *tragic episode in his life,* while to the agents of the Federal Bureau of Investigation, it was just another case. WHO IS MORE LIKELY TO HAVE REMEMBERED THE FACTS AFTER A SEVEN YEAR PERIOD, KLAPPROTT, THE MAN WHO WAS INVOLVED OR THE AGENTS? We submit the facts of this case and what occurred must be clearer in Klapprott's mind. We are convinced the testi-

mony on this very subject of documents sustains that fact. We are convinced petitioner wrote the letter in question, and did try to prepare an answer, and that the letter was removed from his residence. He was under the impression that the Court would not appoint an attorney to represent him in a Civil Case (App. 159a). As result petitioner began writing a letter to the American Civil Liberties Union requesting legal assistance. He testified he made hand notes which consumed one week before he finally got the letter reduced to a typewritten copy (App. 160a).

The witness stated:

> " I wasn't so good in English to write such a letter, but I worked on this for a long time, making notes first, and then I cut this out, that out, and then I tried to make it look like something worthwhile to send away."

Klapprott further testified he was working on an answer to the complaint the night before his arrest (App. 150a):

> "Q. Now, did there come a time—— by the way what did you do with the letter that you prepared to send to the Civil Liberties Union?
>
> A. That morning I had the letter in a pocket and that morning I wanted to send that letter away, and when I was arrested, the F. B. I. who arrested me, THE F. B. I. MEN TOOK THIS LETTER AWAY FROM ME," (App. 160a)

On cross examination (App. 230a) the petitioner testified as to just what took place at the time of his arrest and search of the premises by the F. B. I. agents (App. 230a-231a):

> "Q. And you say you saw them take it?
>
> A. *I saw him take it, yes.*"

Prior to the time the two agents testified the affidavit of each one, Government Exhibit 2 (App. 476a) and Government Exhibit 3 (App. 478a) was offered in evidence. Both affidavits deny that the letter in question was seen or taken. Agent Kleinkauf's affidavit was signed May 17, 1949 as was Agent Tucker's.

It is beyond our understanding why the affidavits were required, and the contents of which we will discuss following the recitation of certain testimony advanced by the agents relative to the letter and answer. On direct examination Agent Tucker (App. 332a) testified:

> "Q. Where were you while the search was being made?
> A. I was downstairs, I *believe* it was the kitchen with Mrs. Klapprott, Agent Kleinkauf and Mr. Klapprott were upstairs and in other parts of the residence. They returned to the kitchen and *at that time I left the premises to go to a neighbor,* I *believe, to see if there was someone around that could come and stay with Mrs. Klapprott while he went to Newark. I returned in about a half an hour, I believe.*"

On further direct examination (App. 345a) the witness was asked:

> "Q. Mr. Tucker, did you at any time on July 7, 1942, either observe, hear about, see in the possession of Agent Kleinkauf, or take from any person or place a letter addressed to the American Civil Liberties Union?
> A. No, sir."

On cross examination Agent Tucker admitted he was not immediately present when Agent Kleinkauf made the search of the house (App. 348a) and as to that question testified (App. 348a):

> "Q. You wern't in the presence of Mr. Kleinkauf when he actually made the search of the house.
> A. No, I wasn't.
> Q. Did you see him remove any documents?
> A. No, sir.
> Q. Did he tell you what documents he had removed?
> A. He said he had two or three letters.
> Q. Two or three letters?
> A. That's right.
> Q. *Did you ask to see them?*
> A. *No, I didn't.*
> Q. *You didn't see them at all?*
> A. *No, I didn't.*
> Q. Did you ask him what the nature of the letters was?

A. He told me they were in German and that was the main reason for taking them.
Q. Did he discuss whether or not he had seen any other correspondence in the house that day?
A. No, sir.
Q. Did you ask him?
A. No, sir."

Agent Tucker was again called to the witness stand (App. 393a) and asked:

"Q. Mr. Tucker, you testified, or did you testify that these three letters were the only documents taken from Klapprott's residence?
A. That's right.
Q. And are you certain of that?
A. That's right.
Q. And you couldn't be mistaken?
A. *That's all I saw that were taken.*

We refer back to the prior testimony of this witness on cross-examination (App. 348a-349a) concerning the very documents that were taken and the witness was asked:

"Q. Did you ask to seee them?
A. No, I didn't.
Q. *You didn't see them at all?*
A. *No, I didn't.*

In view of the testimony we cannot agree with the contents of Agent Tucker's affidavit stating "A SEARCH WAS MADE BY AFFIANT TOGETHER WITH SPECIAL AGENT CHARLES E. KLEINKAUF OF THE FEDERAL BUREAU OF INVESTIGATION. THAT AS RESULT OF THE SEARCH OF THE PREMISES OF KLAPPROTT, CERTAIN DOCUMENTS CONSISTING OF LETTERS MAPS AND COMMUNICATIONS WERE SEIZED".

It must be conceded that Agent Tucker was not in the immediate presence of Agent Kleinkauf when he made the search of the premises and stated that he did not see Agent Kleinkauf remove any documents or letters (App. 348a)

Agent Tucker's testimony makes reference to only three letters being taken by Agent Kleinkauf and yet in the affidavit (App. 478a) he states:

"That as a result of the search of the premises of said Klapprott, certain documents consisting of *letters, maps and communications were seized.*"

In fairness we feel he was reasonably mistaken and that the great lapse of time between July 7, 1942 and May 17, 1949 the date the affidavit was executed accounts for the variances. In fairness to Klapprott, would it not have been reasonable for the District Court to have assumed that if Agent Tucker's testimony was in variance with the contents of his affidavit as to just what was removed from Klapprott's residence, that he likewise could have been reasonably mistaken, when he stated that no letter addressed to the Civil Liberties Union had been taken.

The fact stands undisputed, that Agent Tucker was not in the immediate presence of Agent Kleinkauf when the search was made, and furthermore he admitted leaving the premises FOR ABOUT ONE HALF AN HOUR in an effort to obtain some one to stay with Mrs. Klapprott (App. 333a). Agent Kleinhauf stated (App. 305a):

1. That he did not give Klapprott a receipt for the articles that were removed from the residence.

2. That he did not make a list or memorandum of the articles that were taken.

The testimony of Agent Kleinhauf contains answers to many questions in which he stated in effect that he was "unable to recall". We can well appreciate that after a lapse of seven years, just how difficult it was for this witness or any one else to exactly recall what happened. On cross examination Agent Kleinkauf testified as to the articles that were taken (App. 307a):

"Q. And is that all you took, these three letters?
A. That is all that I took.
Q. Is that all you took out of the house?
A. *That is all I RECALL taking.*

Q. Were any other articles taken?

A. *Not that I RECALL.*

• • • • • • •

(App. 308a):

Q. Were there any other papers that you came across that you did not take?

A. Oh, yes, there were other letters and papers but they were written in English and *we* were able to read them and decide what they were and so we did not take them.

Q. What were some of those letters?

A. *I DON'T RECALL.*

Q. Were there any letters relating to the denaturalization?

A. No, I had no knowledge of the denaturalization case.

Q. In that search that you made of the house did you come across any memorandum or notes relative to the denaturalization case?

A. *NOT THAT I RECALL, NO SIR.*

Q. In your search did you come across a partially completed answer to the complaint in the denatulalization case?

A. *Not do I RECALL such a paper.*

Q. Well could you possibly have come across it and not recall it now?

A. IT IS *POSSIBLE* BUT I HAVE NO *RECOLLECTION* of it.

Q. And would it be possible that you came across a letter addressed to the American Civil Liberties Union and can't recall it now?

A. No. I definitely did not see such a letter.

Q. Well, would you have remembered that particular letter?

A. I *think* I would.

Q. Well, can you remember any of the other letters you saw that you did not feel were material to your situation?

A. *No, I cannot recall any specific letters ta this time.*

• • • • • • •

(App, 310a):

Q. Do you recall taking anything from a coat pocket in his house?

A. Yes, I believe *several* of these letters were in a coat pocket.

Q. When you say "several of these letter" there are just three here, how many letters do you mean?

A. *I don't recall exactly,* but it is my *recollection* that either one or two of the letters were in a coat pocket and the *other letters, I believe,* were in a dresser drawer or lying on top of the dresser."

The Agents were apparently never questioned about the letter until they signed the affidavits on *May 17, 1949.*

In support of the foregoing statement we quote certain testimony of Agent Kleinkauf (App. 476a):

"Q. By the way, where were these particular letters, these three letters, kept after you returned to the Federal Bureau of Investigation?

A. They were placed in the file pertaining to Mr. Klapprott's case.

Q. When did you advise the U. S. Attorney's Office or anyone else of having those three letters?

A. WHY I DIDN'T ADVISE HIM DIRECTLY AT ANY TIME UNTIL AFTER THE QUESTION CAME UP ABOUT SIX WEEKS AGO AT THE TIME I FINISHED THE AFFIDAVIT.

Q. And did anyone inquire about the letters to you prior to six weeks ago?

A. No.

Q. Did you receive any communication from anybody about the letters?

A. No."

It is urged that a period of approximately seven years had elasped when the witnesses Kleinkauf and Tucker testified as to the existence of a letter which Klapprott claims to have written. When one reflects on the entire situation the number of cases these agents worked on and the statement by Agent Kleinkauf who testified on June 16, 1949, that the first time he heard about the letter was *about six weeks ago* when he was requested to furnish an affidavit (App. 299a) and *which was executed May 17, 1949,* a serious doubt as to the value of the testimony is raised. This witness could have been reasonably mistaken in his testimony.

No records were made, nor was a receipt given for the seized letters. The witness was obliged to rely on his memory as to what was seized approximately seven years ago. All facts and circumstances considered, the time element, lack of record, we submit the Court erred in finding as false Klapprott's statement as to the letter and partially completed answer.

We again ask, who would have been the one to best remember the facts relating to this particular letter, the Agents of the Federal Bureau of Investigation who made no memorandum of what was taken on July 7, 1942, or August Klapprott, the man whose citizenship was at stake? We respectfully urge that the incident must have been foremost in the mind and memory of August Klapprott.

IN THE FIFTH PHASE OF ARGUMENT A REFERENCE IS MADE TO THE ALLEGATION CONTAINED IN PARAGRAPH 5 OF KLAPPROTT'S PETITION (App. 15a) RELATING TO HIS CONVERSATION WITH COURT APPOINTED COUNSEL, IN NEW YORK CITY REGARDING THIS DENATURALIZATION CASE AND WHICH THE DISTRICT COURT FOUND TO BE FALSE. (App. 453a)

Concerning this point the Appellate Court stated (App. 489):

> "There is nothing in the record to validate the fourth request which was denied as false. Regarding this point, appellant's brief states as follows: 'At the outset we concede that Klapprott's belief that his Court-appointed counsel in the New York case permitted a judgment to be entered against appellant in the denaturalization proceeding was an incorrect statement.' It is admitted in the same part of appellant's brief that the Court appointed attorney for Klapprott in the New York case never spoke with Klapprott prior to his appointment on July 28, 1942. The default judgment in the instant suit was entered July 17, 1942. While it is not conceded that Klapprott, at the time he spoke to the attorney, knew that a default judgment had been entered against him, he did know the expiration date for his appearance, and he did know that he had not appeared."

We agree there is a statement contained in Klapprott's brief stating that "At the outset we concede that Klapprott's belief that his Court-appointed counsel in the New York Case permitted a judgment to be entered against appellant in the denaturalization proceeding was an incorrect statement". We do not concede that Klapprott's *belief* as to the foregoing fact was incorrect, but only that the fact itself was incorrect and, we also said *the incorrect statement of Klapprott's was AN HONEST ERROR.*

Due consideration should be given to the fact that Klapprott had spent 4½ years in jail at the time the petition was prepared, and in addition endured the harassing criminal trials, protracted of nature and, not knowing just what his fate in point of penal years would be. IS THERE LITTLE WONDER THAT THERE WERE SO FEW DISCREPANCIES IN THE PETITION AND WHICH WAS PREPARED IN HASTE WHILE PETITIONER WAS STILL CONFINED ON ELLIS ISLAND AWAITING DEPORTATION.

Edward M. McDonald the Court appointed counsel who represented petitioner in the criminal case in New York City stated that he had never spoken to Klapprott prior to July 28, 1942 (App. 324a) and we concede that the default judgment was entered July 17, 1942. At the time August Klapprott spoke to Attorney McDonald about his citizenship case he of necessity HAD NO KNOWLEDGE THAT IT HAD BEEN CANCELLED BY A DEFAULT JUDGMENT. In the Appellate Court's opinion (App. 490a) it is stated:

> "WHILE IT IS NOT CONCEDED THAT KLAPROTT, AT THE TIME HE SPOKE TO THE ATTORNEY, KNEW THAT A DEFAULT JUDGMENT HAD BEEN ENTERED AGAINST HIM, HE DID KNOW THE EXPIRATION DATE FOR HIS APPEARANCE, AND HE DID KNOW HE HAD NOT APPEARED".

The foregoing statement is correct, but are we to infer from the language of the Court that AUGUST KLAPPROTT HAVING BEEN ARRESTED ON JULY 7, 1942, RE-

MOVED TO NEW YORK CITY, HELD UNDER A BAIL OF $25,000 DID NOT HAVE A REASONABLE BELIEF AND FAITH IN THE FACT THAT THE GOVERNMENT WOULD NOT PROCEED AGAINST HIM IN THE STATE OF NEW JERSEY TO TAKE A DEFAULT JUDGMENT WHEN HE WAS INCARCERATED BY THE SAME GOVERNMENT IN THE STATE OF NEW YORK AND RENDERED HELPLESS TO APPEAR AND DEFEND HIMSELF? Are we to assume that because Klapprott knew the expiration date for his appearance THAT A DEFAULT JUDGMENT WOULD BE TAKEN IMMEDIATELY THEREAFTER?[8]

An inference is raised that petitioner knew at the time he first conferred with Attorney McDonald and discussed his citizenship case that a default judgment had been entered against him cancelling his certificate. Such an inference is not correct. Just what means did Klapprott have of knowing a default judgment had been entered against him in the District Court at Newark, New Jersey, on July 17, 1942. On that date and several days prior thereto he was incarcerated in the Federal Detention Headquarters at New York, New York, indicted and held under a bail of $25,000.00 which he could not raise. He never received notice of the Government's intention to take the default and to enter a judgment cancelling his certificate of citizenship, and the record is devoid of any evidence that he was ever formally notified at any time that he had lost his citiship. Petitioner never stated that he had knowledge of the default when he spoke to Attorney McDonald (App. 396a):

> "Q. Now, at that time when you first spoke with Mr. McDonald, did you know of your own personal knowledge that your citizenship had been taken by default?
> A. I did not.
> Q. Do you recall ever telling him on your first conference that your citizenship had gone by default?
> A. I did not tell him that."

The fact remains that petitioner was vitally concerned about his citizenship case and did speak with Attorney McDonald about it during their first conference. However, he

was faced at the time with an indictment on a charge of violating the "Selective Service Act" and was being held under bail of Twenty-Five Thousand Dollars ($25,000.00). He knew that conviction would mean a long term of imprisonment. We sincerely urge that at the time Klapprott conferred with Attorney McDonald his orientation as to time was confused and he did not know, and could not have known that the default judgment had been taken. The record is clear and proves beyond a shadow of doubt that at the time he was a dejected and confused man. *We again ask the Government as we have in the past—why did the authorities in Newark, New Jersey, fail to notify petitioner that a default was to be entered July* 17, 1942?

We most respectfully submit that after petitioner was apprized of his error as to the date he first spoke with Court appointed counsel, his testimony explained the mistake. (App. 396a):

> "Q. Now, at the time that you signed the petition or signed the affidavit what was your best recollection as to the first time you did see Mr. McDonald following the day of arraignment in New York City?
>
> A. My impression was and still is today, that I saw Mr. McDonald only a few days after the arraignment in the Foley Square Court House.
>
> Q. What was the condition of your mind, your mental attitude at the time. Were you in an upset condition?
>
> A. I was always thinking of the trouble and my little baby at home and my Missus without any support.
>
> Q. Well, now you heard the record today stated as to when Mr. McDonald first saw you, so there is a possibility that you were honestly mistaken as to dates?
>
> A. If the dates Mr. McDonald says are correct, *I must be mistaken on this time.*"

We believe the error as to date has been exaggerated by the Government and no doubt the Court predicated its findings on the manner in which the Government stressed its importance. It is undisputed that Klapprott was concerned about losing his citizenship and did speak with Mr. McDonald about it in presence of other persons.

Hugo Weiss, a co-defendant in the case of *United States v. Keegan, et al.,* and whom Mr. McDonald was also ap-

pointed to defend testified on direct examination (App 250a):

"Q. Did you ever hear Mr. Klapprott mention to Mr. McDonald anything about his denaturalization case?
A. I did.
Q. And where did you hear him mention it?
A. In the attorney room in Foley Square.

• • • • • • •

Q. Now, just, if you can recall, the best you can recall, did you hear Klapprott say?
A. Well, we got together to talk to Mr. McDonald and he asked us to explain to him how the whole thing came about, the indictment and so forth, and he tried to, out of what we told him, he tried to construct a defense. SO MR. KLAPPROTT ALSO TOLD HIM THAT HIS CITIZENSHIP PAPER WAS ATTACKED BUT THAT HE HAD NOT BEEN IN A POSITION TO DO ANYTHING ABOUT IT, AND THAT HE WAS WORRIED ABOUT, AND WHAT HE THOUGHT OF IT.
Q. And did Mr. McDonald answer him?
A. He answered him to the effect that he shouldn't worry about it, that it would all turn out to be all right."

Mr. Weiss was asked on cross examination (App. 253a):

"Q. And you had stated that you heard Mr. McDonald say to Mr. Klapprott he should not worry about it.
A. Yes.
Q. That everything would be alright.
A. Yes.
Q. Now, is that all that Mr. McDonald said?
A. Well, he was talking more to him but I didn't listen to the rest."

The Court was in error when it found the statement of Klapprott as false when one considers the mental and physical condition of petitioner at the time. It is difficult to visualize a man so situated as was Klapprott, torn from his family, indicted by a Federal Grand Jury on a most serious charge and the conviction of which this Honorable Court reversed outright after Klapprott had served over 3 years of a 5-year sentence. *Keegan et al v. United States, 325 U. S.*

443, as having a clear memory. Mr. McDonald was under no duty whatsoever to look into Klapprott's denaturalization case. Counsel was a member of the New York State Bar and not of New Jersey; that he was appointed to defend petitioner in a criminal proceeding in New York City, and we submit he and associate counsel rendered excellent service to all defendants and which was demonstrated by the later action of this Court in reversing the convictions outright. We are confident however that the following testimony of Klapprott was truthful, and discrepancies in the testimony of any witness was result of the long lapse of time. (App. 168a):

> "Q. Well, what did you say to him if anything, about your citizenship case?
> A. Then I came and told him about the matter in New Jersey, that he should look into it, and he promised me that he would do so, and I shouldn't worry and shouldn't get so much excited, he told me.

On re-direct examination he denied ever having stated to Mr. McDonald that his citizenship had gone by default (App. 396a):

> Q. Mr. Klapprott, you heard the testimony by Mr. McDonald as to the time you first spoke with him.
> A. Yes, I did.
> Q. Now, at that time when you first spoke with Mr. McDonald, did you know of your own personal knowledge that your citizenship had been taken by default?
> A. *I did not.*
> Q. Do you recall ever telling him on your first conversation that your citizenship had gone by default?
> A. I did not tell him that."

It has been definitely established that Klapprott was so concerned about the citizenship case he spoke to Mr. McDonald. The date of the conversation is inconsequential. The Government failed to establish that Klapprott knew he had lost his citizenship at that time. Likewise the Government failed to prove delivery to Klapprott of any official written or verbal notice that his certificate of citizenship had been cancelled. Considering the testimony as a

whole we are convinced that the Court erred in finding the general statement as false.

It is urged that the minute consideration by the District Court as to the date in question and petitioner's misconception that Mr. McDonald permitted his case to go by default is a minor detail and is overshadowed by the real tragedy of this case. We have asked the Government in the past and we again raise the question as to why petitioner was not advised that a default judgment was to be taken?

Removal proceedings were instituted before the U. S. Commissioner, in Newark, New Jersey, following Klapprott's arrest on July 7, 1942. It was a well-known fact he was held under high bond and removed to New York City and incarcerated. He was rendered helpless which made it absolutely impossible to appear in the District Court at Newark, New Jersey, unless the authorities provided the ways and means for him. We submit there was a manifest duty upon the Government first to advise petitioner of the proposed default and then to make it possible for him to appear. Not having done the former, the United States Attorney's Office in Newark, New Jersey, should have advised the Court of Klapprott's predicament and inability to appear.

CAN KLAPPROTT'S FAILURE TO APPEAR IN NEWARK, NEW JERSEY, TO OPPOSE THE GOVERNMENT'S ACTION IN TAKING A DEFAULT JUDGMENT CANCELLING HIS CERTIFICATE OF CITIZENSHIP BE HELD AGAINST HIM WHEN HE HAD NO KNOWLEDGE THAT SUCH STEPS WOULD, OR WERE BEING TAKEN WITH HIM HELPLESSLY INCARCERATED IN NEW YORK CITY? We feel duty bound in repeating, that the authorities at the time well knew that Klapprott was confined in prison on a serious charge in another Federal jurisdiction. We are constrained again to repeat, JUST WHAT MEANS WOULD KLAPPROTT HAVE HAD TO APPEAR IN NEWARK, EVEN IF HE HAD BEEN GIVEN NOTICE OF THE DEFAULT JUDGMENT? THE FOREGOING ARGUMENT AS STATED BEFORE HAS BEEN RAISED IN ALL

OUR BRIEFS *AND TO THIS DAY REMAINS UNANSWERED.*

WE MOST SINCERELY ASK *WHICH WAS THE* **GREATER ERROR:**

1. Klapprott's innocent failure to have correctly stated the date when he first spoke to his Court appointed Counsel in New York about his denaturalization case or the act of the Government in taking a default judgment cancelling Klapprott's certificate of citizenship on July 17, 1942 (App. 11a), well knowing that he had been removed from that jurisdiction on July 9, 1942 to New York City.

In closing this phase of argument we most respectfully urge that Klapprott should not be penalized on a matter of dates which in fact are inconsequential.

AS TO THE SIXTH PHASE OF ARGUMENT WE RESPECTFULLY URGE THAT THE DISTRICT COURT ERRED IN ADMITTING TESTIMONY RELATING TO PETITIONER'S POLITICAL VIEWS AND ON OTHER MATTERS UNRELATED TO THE PARTICULAR PROCEEDING.

We will only touch briefly on certain testimony that the court admitted on the theory as set forth in the opinion of the Circuit Court of Appeals (App. 490) and which was as follows:

> "Generally speaking, the objected to testimony was illuminative regarding Klapprott's credibility, his education, training, character and ability, which were the reasons announced by the Court below for permitting it, and which were important in arriving at the basic decision in this case."

We would not contest the admissibility of testimony touching on Klapprott's political views, his likes and dislikes, association with the German-American Bund and it's affiliated organizations *at a trial on the merits to cancel his certificate of citizenship,* but we respectfully urge, that it was error for the District Court to have received such evi-

dence in this *particular* proceeding. To permit such evidence was in the violation of the directive of the United States Supreme Court's amended judgment (App. 103a) which read as follows:

> "The judgment of the Court of Appeals is reversed and the cause remanded to the District Court with *directions* to receive evidence on the truth of falsity of the allegations contained in petitioner's petition to vacate the default judgment entered in the denaturalization proceedings."

The reception of such testimony occurred so frequently that the record is replete with objections interposed by counsel. To enumerate all such testimony and objections thereto would create a voluminous brief. We urge that such testimony does not fall within the scope of the proceeding. It was inflammatory and could only create prejudice towards Petitioner if all the statements were accepted as being correct.

Objections were made continually relative to cross examination of petitioner about his association with the A. V. Publishing Company (App. 205a), the German American Bund and its' affiliate organizations and all of which were dissolved prior to the outbreak of World War Two and other testimony relative to his political views (App. 279a). We are constrained however, notwithstanding continuing objections of petitioner's counsel as to the admission of such political evidence to set forth certain testimony of F. B. I. Agent Gene De Neisiger and which we submit formed the real basis for Petitioner's statements.

> "Q. Now isn't it a fact that during your entire conversation with him that he always had the trend of anti-communism, that is, what his cause was fighting?
> A. It is true that he did mention communism several times, we discussed that subject thoroughly.
> Q. *He was rather violent on that subject, wasn't he?*
> A. *Definitely.*" (App. 281a).

There can be no question but what the admission of testimony relating to the sinking of the U. S. Carrier Lexington

(App. 338a) (App. 339a) and testimony relating to petitioner's opinion on political matters about Germany and Hitler in general (App. 346a) was prejudical and had no place in this proceeding and the admission of such was error.

THE SEVENTH PHASE OF ARGUMENT CONCERNS PETITIONER'S CONTENTIONS THAT THE DISTRICT COURT ERRED IN NOT FINDING AS A FACT THAT THE HARRASSING CRIMINAL TRIALS TO WHICH PETITIONER WAS SUBJECTED, AND THE LONG PERIOD OF CONFINEMENT IN JAIL, HAD SO PREOCCUPIED HIS MIND AND UNDERMINED HIM PHYSICALLY AND MENTALLY, THAT HE WAS NOT GUILTY OF NEGLIGENCE OR NEGLECT IN FAILING TO DO MORE THAN HE DID INITIALLY IN SEEKING TO DEFEND THE DENATURALIZATION CASE.

Petitioner was a defendant in the case U.S. vs. Keegan, et al. 141 (2, 148, 325 U.S. 443) and which was a grueling ordeal lasting over one month and ending with his conviction and five year sentence. Petitioner was later a defendant in the case *U.S. vs. McWilliams, et al.*, 163 F.(2d) 695 and which *lasted 8½ months before the untimely death of the trial judge.* In the case of *Klapprott v. U.S.*, 325, U.S. 601, 93 L. Ed. 266.

Mr. Justice Frankfurter in his dissenting opinion (App. 101a) said:

> "And so I would not deny Klapprott an opportunity, even at this late stage, to establish as a psychological fact what his allegations imply, namely, *that the harassing criminal proceedings against him had so preoccupied his mind that he was not guilty of negligence in failing to do more than he initially did in seeking to defend the denaturalization proceeding.*"

The modified portion of the judgment of the Supreme Court (App. 102a) appears to be in conformity with the opinion of Mr. Justice Frankfurter (App. 989a).

We urge that what Petitioner endured from March 1942 until January 7, 1947, when the instant petition was filed, presents a set of facts and circumstances that would cause any human being, not only to lose hope, but in fact to so undermine his morale to the point of not being accountable for his actions. Let us analyze the testimony and the stipulated set of facts and see what Klapprott was compelled to endure following July 7, 1942 the day of his arrest.

It must be conceded that the illness of petitioner, the constant questioning by agents of the F.B.I. and the fact that KLAPPROTT was literally torn from his family, most certainly shattered his physical and mental ability to cope with the criminal trial he was about to face.

While a great number of the following facts were stipulated in the hearing before the District Court we feel duty bound to enumerate the various ordeals that confronted KLAPPROTT following his arrest on July 7, 1942.

1. He had been indicted along with 24 other defendants in the Southern District of New York charged with conspiracy to violate the Selective Service Act, (U.S. vs. Keegan et al. 141 F. (2d) 148).

2. At the time of his arrest F.B.I. agent Kleinkauf testified that Klapprott had only one or two dollars on his person. (App. 312a).

3. He was removed to F.B.I. headquarters in Newark, New Jersey and questioned at length (App. 161a) and then required to spend two nights in the Hudson County Jail in Jersey City (App. 162a).

4. Petitioner appeared before the U.S. Commissioner in Newark, New Jersey and was held under $10,000. bail which he could not raise (App. 162a) and was subsequently removed to the Federal Detention Headquarters in New York City chained or handcuffed to two other defendants. (App. 162a).

5. At time of arraignment, petitioner's bail was increased from $10,000. to $25,000. and upon leaving the court room he was told (App. 165)

"IT'S NO USE KLAPPROTT TO EVEN THINK ABOUT YOUR BAIL, IF YOU WANT TO RAISE IT WE'LL DOUBLE AND YOU'LL HAVE TO STAY IN ANYWAY."

6. PETITIONER TESTIFIED (App. 164a) THAT THE CELL IN WHICH HE WAS CONFINED LOOKED LIKE A MONKEY CAGE AND WAS INSIDE THE BUILDING AND CONTAINED NO WINDOWS; THAT HE WAS NOT PERMITTED TO MOVE AROUND WHILE HE WAS DETAINED THERE AND WAS LED DOWN THE HALL TO EAT AND LOCKED UP AGAIN. (App. 165a).

7. APPROXIMATELY ONE WEEK PRIOR TO THE TRIAL IN NEW YORK CITY, KLAPPROTT WAS SINGLED OUT AND MOVED TO THE TOMB'S PRISON IN NEW YORK CITY AND PLACED IN A CELL BY HIMSELF.

The witness was asked (App. 166a):

"Q. Did you have any conversation with anyone in the Tombs Prison relative to that particular cell?

A. The first thing that happened to me was that when it came the time when they had to walk up and down this floor in front of the cell * * * they all looked at me in the cell. 'Oh,' they said 'Oh, there is another one who goes to the chair.' And when I——

Q. Another one what?

A. Another one who goes to the chair, they said. And then I said 'What's this about the chair?' And they said 'Well this morning just one left for Sing Sing to the electric chair out of your cell.' "

The trial lasted about one month and ran from about ten o'clock to about four o'clock each day (App. 169a). Klapprott said the lawyers were sitting in front of the Judge and that he could not converse with his lawyer. The defendants were placed like a herd (App. 170a). Edward W. McDonald, Klapprott's counsel, testified on cross-examination (App. 328a):

"Q. Now, during the trial was Mr. Klapprott permitted to sit beside you?

A. No, all the defendants sat at one side of the Courtroom and the counsel sat at a table together.

Q. * * * Didn't that particular fact, in your mind, upset Mr. Klapprott, that he wasn't beside his attorney as he should have been?

A. *I suppose they were all upset that they weren't beside their attorneys.*"

In support of our contention that KLAPPROTT was overwhelmingly preoccupied during the trial we refer to cross-examination of Mr. McDonald (App. 327a):

"Q. Now during the course of his trial in New York it lasted you say, about five weeks.

A. Four or five weeks.

Q. And how many witnesses would you say the Government produced?

A. I don't know; about 30 or 40, maybe.

Q. It was a great number of witnesses?

A. Yes, a great number.

Q. And during that period of time you would have to confer with Mr. Klapprott about the testimony of the various witnesses?

A. Yes.

Q. *And his mind was pretty well preoccupied, was it not, with the criminal trial?*

A. *Yes.*"

At the conclusion, Klapprott was found guilty and sentenced to five years in the penitentiary (App. 172a).

9. He was kept in segregation during the trial and was permitted to read only censored newspapers after all articles of the trial had been deleted (App. 172a). Following the conviction his attorney came to see him (App. 172a) and said "*he felt sorry that it all came out that way but he was through with the case now, he couldn't do anything else.*"

Petitioner remained at the Federal Detention Headquarters until an appeal was taken by newly appointed counsel. It is apparent that Klapprott must have been duly apprehensive about the appeal and just how to proceed after his former counsel had informed him he was through with the case. Petitioner testified (App. 174a):

"Q. Now, as result of your conviction and sentence to five years, how did that affect you physically and mentally?

A. Well I was not so much thinking about myself but always about my little girl and my family and how such a record would reflect on them, and I was trying to make an appeal to get this off my, you know, person, this conviction, and there is where I was always interested in, to get the appeal going."

10. After the appeal had been perfected Petitioner elected to begin service of the five year sentence. He was removed to the Federal Correctional Institution, Milan, Michigan, *chained* to two other prisoners and placed in segregation in a cell by himself and not allowed yard privileges. He went to his meals under guard (App. 175a). As to the particular cell in which he was placed the witness testified (App. 176a):

"Q. Did you have any unusual conversation with anyone about the cell you were placed in at Milan, Michigan?

A. Those fellows who were up there told me right away that this was the cell that was left by Mr. Steffan, who was then convicted of treason in Detroit, I think it was, and he was kept there in the same cell where I had come, after he got out of the death house."

11. During confinement at Milan, and at other institutions his mail was censored not only by prison authorities, but in addition was sent to Washington, D. C. for censoring (App. 177a). As result a considerable time elapsed before mail reached him, or the person to whom he had written, all of which of necessity upset him.

12. Petitioner and some 29 other persons were indicted in Washington, D. C. in the case of *United States v. Joseph McWilliams, et al.*, 163 F. 2d 695, on January 3, 1947. During the month of January he was removed from Milan, Michigan to the District Jail, Washington, D. C. When asked about conditions in the Washington, D. C. Jail, he said (App. 178a):

Q. Now, when you were taken to the District Jail, what was your situation as to segregation there?

A. Well I was placed in maximum security and all the time before, from January on, before the trial ever

started, which must have been in April when it started. I never saw the sun out there and never had any recreation at all; I was just locked up from the ——— we went to breakfast and to lunch and the evening supper tables, then we were locked up right away again.

On May 15, 1944, the United States Court of Appeals, for the Second Circuit affirmed Petitioner's conviction in the case of *United States* v. *Keegan, et al., 141 F. 2d 248, and the five year* sentence remained *undisturbed.*

With the "Sedition" case under way and a possible additional *10 year sentence* facing Klapprott if convicted, is it reasonable to assume that he was in a physical or mental condition at that time to attempt to take the necessary steps to do something about the default judgment. We think not.

13. The "Sedition" case began April 17, 1944 and ended in a mistrial some eight months later as result of Judge Eicher's sudden death. During the period, from date of mistrial up to *December 6, 1946 Klapprott was forced to remain in jail.* During the month of November, 1946, Chief Judge Laws, of the U.S. District Court, Washington, D. C., dismissed the indictments and we are constrained to set forth a portion of the Court's opinion which is cited on page 696, *United States v. McWilliams, et al.,* 163 F. 2d 695:

> "Usually the Court will permit the prosecutor to decide whether he will bring a case to trial. But where it appears, as here, there is serious doubt as to the success of the case, and that the defendants, because of long delays granted over their objections, *cannot obtain a fair trial,* the Court should exercise its discretion to deny prosecution. *It would be both unjust and un-American to do otherwise.*
>
> *"The defendants have been before the Court upon these charges for nearly four and one-half years.* • • • *Because of the impoverished state of eighteen of the defendants they were represented by counsel not of their own choice, but assigned by the Court to serve without compensation.*
>
> • • • Under the circumstances to permit another trial, which conceivably would last more than a year, with new prosecutors and newly appointed counsel for

defendants, with the eventual outcome in serious doubt, as Mr. Rogge (Government Counsel) has stated to the Court on three occasions would be a travesty of justice. I have no doubt the cases should be dismissed and an order to that effect will be entered as to all defendants."

The Government did not give up however and the case was taken to the United States Court of Appeals for the District of Columbia Circuit, Judge Laws was affirmed by that Court June 30, 1947. Sitting in Court eight months was a nerve wracking ordeal for all defendants including Klapprott and their Court appointed counsel. *Approximately 18,000 pages of testimony was taken. More than 1000 exhibits were introduced by the Government, most of which were in German and from which the Government prepared translations in English* (App. 196a). *Klapprott and others familiar with the German language devoted a great deal of their time in Court and at the District Jail checking translations, which were voluminous. Can one say that petitioner's mind was not preoccupied during that period of time?*

14. On June 11, 1945 the United States Supreme Court reversed outright petitioners conviction in the case of *United States* v. *Keegan et al., 325 U.S. 478.* Here, *was a man who had served a prison term of approximately three years, of a five year sentence that was now reversed.* Even then he could not be released because the "Sedition" case was still being held in abeyance awaiting the Government's pleasure. As a result Klapprott remained in the District Jail until December 6, 1946. *During this period he had a possible 10 year sentence facing him in event of another conviction.* When asked about his mental and physical condition during that period he stated (App. 198a):

"Q. Did the possibility of this ten year sentence and the eight month ordeal of trial, in any way further affect your physical or mental condition?

A. Well, when I got the first five years, I understood that by already having five years on a criminal charge would automatically do away with your citizenship. Now I faced another ten years right in Washington

there. And I was always thinking of getting rid of these criminal indictments and conviction and trying to regain my citizenship."

After all criminal charges had been dismissed and for which petitioner had been confined from *July 7, 1942 until December 6, 1946, he was technically released.* Klapprott was immediately apprehended by the Immigration authorities and removed to Ellis Island for deportation (App. 199a). After the one criminal case was reversed and the other dismissed, appellant testified (App. 203a):

"Q. Mr. Klapprott, up to the time that you proceeded in this particular case, were you able to obtain money from any person to proceed at a sooner date?

A. No. I am sure that even if I would have asked anybody to give me money, with those criminal indictments and convictions on my head, nobody would have advanced me money—I know it. But after these criminal indictments and the criminal conviction was off, I felt now at least you have the right to ask somebody again to help you, because then somebody would, *after seeing that after all these years being in jail, I was still innocent, they would have some trust in me.* So then I did ask to get some money and somebody advanced me money, which I then used for hiring a lawyer to defend me in this citizenship trial * * *."

How the Government can argue that Klapprott was negligent in not doing something to reopen his denaturalization case to set aside the default judgment during the sordid years of incarceration which he endured is beyond our keenest comprehension. *We have heard no one say that any wrong or injury was done Klapprott by compelling him to stay in jail for something* he was not guilty of committing. The only fact that is thrown up to petitioner is, *you had plenty of time on your hands, plenty of mental capacity, literally nothing on your mind while you were serving those four and one-half sorry years in jail. Why didn't you do something? Why didn't you retain a lawyer in New Jersey while you were confined in New York, Michigan and the District of Columbia* to do something about your case?

It appears to us that the requirements of Mr. Justice Frankfurter's opinion have been met. The harassing criminal proceedings which August Klapprott endured so preoccupied his mind that he was not guilty of wilfull negligence in any manner, shape or form in not proceeding at an earlier date in an effort to set aside the default judgment which had cancelled his citizenship.

We are confident that this Honorable Court will agree that the modified judgment of the United States Supreme Court placed an unusual burden on Klapprott, namely, to prove what he alleged in his petition in every detail. An analysis of the testimony viewed as a whole clearly demonstrates beyond cavil *that the principal allegations contained in the petition are true.* If the principal allegations are true, then in accordance with the opinion of this Court (App. 71a) the petition must be sustained and petitioner afforded the right to a trial on the merits. Prior to taking testimony in the District Court counsel for both sides stipulated that most of the facts contained in the petition to vacate the default judgment were correct (App. 109a). The record amply supports the conclusion that the hearing was streamlined by stipulation. *As a result only a few facts remained on which testimony was required to ascertain the truth or falsity of the allegations contained in the petition to vacate the default judgment.*

In light of the decisions of the United States Supreme Court in the cases of *Schneiderman v. United States,* 320 U. S. 118; *Baumgartner v. United States,* 322 U. S. 665 and other cases too numerous to recite, all the evidence adduced by the Government, and testimony admitted over objection of appellant's counsel is insufficient to sustain the allegations contained in the Government's complaint to denaturalize Klapprott. The Government apparently has all its witnesses available; nothing will be lost to permit Petitioner a hearing on the merits. In a case concerning the most priceless possession of man, his American Citizenship, the District Court should have given great latitude to Klapprott in resolving the facts concerning the truth or falsity of the allegations in his petition. We respectfully contend,

however, that such was not the case. The Government in all fairness must concede that the allegations which the District Court found to be false were inconsequential of nature, and were not deliberate false statements. They were the result of the great lapse of time that had ensued from the date of occurrence to the time of executing the petition.

It is respectfully urged that the Court of Appeals was not bound by the District Court's Finding of Facts. We refer to the case of Bechtel v. United States, 176 F. 2d, 743, and which was a denaturalization proceeding. The Court of Appeals for the Ninth Circuit reversed the District Court and in the opinion Page 744 the Court said:

> "There are other aspects of the case, not mentioned in the findings, which we must consider if we are to re-examine the facts as is our duty to do. In a case of this kind WE ARE NOT BOUND BY THE TRIAL COURT'S FINDINGS EVEN THOUGH THEY MAY NOT BE 'CLEARLY ERRONEOUS'."

In the instant case, we most respectfully submit there are many facts favorable to Klapprott, which in our opinion are meritorious and deserve due consideration.

The majority of the facts alleged by Klapprott stand uncontradicted and goes to the very heart of the petition, and in the main, Klapprott's petition to vacate the default judgment must stand unchallenged. The sequitor follows, that if the petition cannot be challenged it is true and in accordance with the modified mandate of this Honorable Court the petition should have been sustained and Klapprott granted the right to a full-dress trial on the merits of the case.

CONCLUSION

In the historical development of our courts, it has always been one of our principles that a defendant should have a trial on the merits where a fundamental right is involved. So much has this been ingrained in our law and every day approach to Civil liberties that the Courts have taken every precaution to protect those precious rights. We urge that

August Klapprott after a lapse of so many years presents a set of facts that justifies him having a trial on the merits of the case.

We respectfully urge that on the basis of the foregoing the writ of Certiorari should issue.

Respectfully submitted,

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(All emphasis supplied)

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 366

AUGUST J. KLAPPROTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 482-491) is reported at 183 F. 2d 474.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1950 (R. 492). The petition for a writ of certiorari was filed on October 16, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the District Court, sustained by the Court of Appeals, which petitioner attacks, are clearly erroneous.

2. Whether evidence as to petitioner's political views and his activities in the German-American Bund was properly admitted.

STATUTE AND RULE INVOLVED

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U.S.C. 738, provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.
>
> (b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; * * *

Rule 60(b) of the Federal Rules of Civil Procedure, as amended, provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, au-

dita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT

On May 12, 1942, the United States filed a complaint under Section 338 of the Nationality Act of 1940, *supra,* p. 2, in the District Court for the District of New Jersey to revoke petitioner's citizenship obtained in a New Jersey court on November 16, 1933, on the ground that it was fraudulently procured because his oath of renunciation of allegiance to the German Reich was false (R. 4-9). On May 15, 1942, petitioner was served personally with a copy of the complaint. He failed to answer it within the statutory time limit of 60 days, which expired on July 14, 1942 (R. 3-4, 110). On July 17, 1942, the United States Attorney moved for a default judgment canceling petitioner's certificate of naturalization. Two F.B.I. agents were called and testified but their testimony was not preserved. (R. 10, 426, 445.) Thereafter, on the same day, a default judgment revoking petitioner's citizenship was entered (R. 10-12, 111-112).

On January 6, 1947, while held at Ellis Island for deportation (R. 16), petitioner filed in the District Court a "petition and order to show cause why default judgment should not be vacated," together with a supporting affidavit (R. 13-25). He

alleged that at the time he was served with the summons on May 15, 1942, he was in ill health and was recuperating at the German-American Bund camp, known as Camp Nordland, and that because of his poor health and straitened financial circumstances, he was unable to obtain an attorney (R. 14, 20-21). On July 7, 1942, a week before the expiration of his time to answer or otherwise move in the denaturalization proceedings, he was arrested under an indictment returned against him and other Bund leaders in the United States District Court for the Southern District of New York charging conspiracy to violate the Selective Service Act of 1940. Petitioner alleged that at the time he was arrested, he had in his possession a letter addressed to the American Civil Liberties Union in New York requesting legal assistance, that the letter was taken from him at the time of his arrest, and that he did not know what had become of it. (R. 14, 21.) "Petitioner had also drawn up a draft of an answer to the complaint and was working on it at the time of his arrest, but because of the fact that he was taken into custody, petitioner was unable to complete it and it was left at petitioner's home when he was taken away" (R. 14). He also alleged that the attorney who was appointed to defend him in the New York conspiracy case promised to look into the denaturalization proceedings, but that the attorney failed to do so (R. 15, 21-22). He further alleged that from the time of his arrest in July 1942 until

November 1946 he was in constant custody under the indictment and conviction on the conspiracy charge (subsequently reversed by this Court, *Keegan* v. *United States,* 325 U.S. 478), and in connection with the sedition trial in the District of Columbia; that, after his release on the criminal charges, he was taken into custody for deportation and confined at Ellis Island (R. 15-16, 21-22). He further stated that in July 1945 he and a number of other persons sought an injunction against possible deportation, but that such relief was denied (R. 16, 23). (See *Citizens Protective League* v. *Clark,* 155 F. 2d 290 (C.A. D.C.), certiorari denied, 329 U.S. 787.) Petitioner alleged generally that "Since he was seriously ill, physically, and since he was in custody during all of the time above-mentioned, and since he had no financial means of obtaining proper legal representation, petitioner was unable to defend the aforesaid proceedings" (R. 16-17).

The District Court, after a hearing (R. 27-53), dismissed the petition, principally on jurisdictional grounds (R. 53-58).

On appeal, the order of the District Court was affirmed, one judge relying primarily on the absence of jurisdiction, although also noting the lack of equity in petitioner's application, one judge relying primarily on laches, and one judge dissenting on the ground that the court should have held a hearing before entering judgment (166 F. 2d 273; R. 60-72).

This Court reversed the judgment of the Court of Appeals (335 U.S. 601; R. 72-106) and in its amended judgment (336 U.S. 942; R. 103) remanded the cause "to the District Court with directions to receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate the default judgment entered in the denaturalization proceedings."

At a hearing in accordance with this mandate, some of the facts were stipulated (R. 109-115) and testimony of 22 witnesses was heard. It was agreed at this hearing that the burden of establishing the truth of the allegations of the petition to vacate the judgment of denaturalization was upon petitioner (R. 141-142).

The evidence adduced at this hearing may be summarized in pertinent part as follows:

A follower of Hitler and the Nazi movement as early as 1933, petitioner was president from May 1937 to 1941 of the German-American Bund Auxiliary, a corporation which controlled Camp Nordland, New Jersey. He lectured on German-American subjects and was a regular weekly writer from 1939 to 1941 in a Bund paper known as the "Free American" distributed by the A. V. Publishing Company, of which he was vice-president. He was Eastern Departmental Leader of the Bund from 1939 until the outbreak of the war. (R. 205-208, 275, 276-277.)

From March 8 to March 26, 1942, petitioner was seriously ill in a hospital in Jersey City, New

Jersey (R. 142-151, 182-185, 255, 451). After he left the hospital he remained in bed for several weeks until about the "middle of April when [he] first walked around" (R. 152). On April 20, at a tavern in Union City, New Jersey, petitioner attended a party with about thirty people, the occasion of which, in his words, was "to welcome me back to my health" (R. 154-156, 215-216). Shortly thereafter he moved with his wife and daughter to Camp Nordland, where he rested but was not employed (R. 153-154, 156-157, 451). On May 15 he was served with a copy of the denaturalization complaint which had been filed on May 12 (R. 3-4, 110, 447).

In the latter part of May 1942, petitioner was requested by the F.B.I. to appear before a grand jury in Hartford, Connecticut, but because of his recent illness his doctor refused permission for him to attend (R. 186, 218, 271). On June 5, F.B.I. agent Watson went to Camp Nordland to see if petitioner was then physically able to go to Hartford. During a tour of the three-acre camp which petitioner conducted for Watson, they were both on their feet about an hour, and Watson testified that at that time petitioner was "normal in every respect." (R. 219-222, 265-266.) Petitioner told Watson that because of his poor financial condition he would be unable to defend the denaturalization suit (R. 220, 267, 269). On this occasion petitioner's doctor consented to the trip to Hartford if petitioner adhered to a diet and was fed

every two hours and not interviewed for longer than two hours (R. 186). With ten dollars for expenses obtained from the United States Marshal, petitioner made the trip, driving alone to New York, whence he traveled the remainder of the distance by train (R. 201-202, 221, 246, 452). After petitioner had testified before the Hartford grand jury on June 9, he seemed "all right" to F.B.I. agent Meunier (R. 271). He made the return trip to Camp Nordland, staying overnight at New York before picking up his station wagon (R. 402, 452).

In the latter part of June 1942, petitioner sold his 1938 Ford station wagon for $200 which he gave to his wife "in case something should happen to [him]" (R. 157, 452). On June 27, F.B.I. agents Weisiger and Baumeister went to Camp Nordland to determine whether petitioner was going to defend the denaturalization suit and to get information concerning his loyalty to the United States (R. 274-275, 455). At that time petitioner freely admitted his affiliations with Bund organizations (R. 276-277). At first he was "perfectly normal," but when the subject of his denaturalization was brought up he became upset. According to agent Weisiger, petitioner said he "wasn't going to defend the denaturalization proceeding." When the agents told him to defend the complaint and that he would get a fair trial, petitioner replied that "in light of the fact that he had written these pro-German articles for A.V. that no one would believe that he was not loyal to Germany

instead of the United States and that therefore he didn't feel he would have a chance * * *" (R. 277-278). Petitioner denied having made such a statement to the agents (R. 223-224).

On July 7, 1942, petitioner and others were indicted in the District Court for the Southern District of New York for conspiracy to violate the Selective Service Act and the Alien Registration Act (R. 110). The same day petitioner was arrested at Camp Nordland by F.B.I. agents Kleinkauf and Tucker on a removal warrant (R. 111, 296, 453). Petitioner signed a written consent authorizing the agents to search his residence and take "any letters, papers, materials or other properties" they might desire (R. 297-298, 333, 453). Although petitioner testified that the agents took from him a letter he allegedly had prepared for mailing to the American Civil Liberties Union seeking an attorney to defend the denaturalization complaint (R. 159-160, 230, 452-453), the agents denied this and any knowledge of such a letter (R. 298-299, 308-309, 345-346, 452-453). Petitioner also testified that on the night of his arrest he was working on an answer, never completed, to the complaint (R. 160, 452-453), but agent Kleinkauf denied seeing any such document in his search (R. 308, 453). Kleinkauf testified that petitioner stated that he had no intention of defending the denaturalization suit (R. 300-301).

The same day, July 7, petitioner was taken to Newark, where he was examined by a Dr. Mat-

thews at the request of the F.B.I. and found "not acutely ill" and that he could "be maintained for questioning without needing any further medical care" (R. 285-287). Petitioner was arraigned before a United States Commissioner in Newark on July 7 and waived hearing on removal. Bail was fixed at $10,000, in default of which he was delivered by the United States Marshal to the Hudson County Jail in Jersey City, where he remained until July 9, when he was turned over to the Marshal for the Southern District of New York. (R. 111, 162.) On that date he pleaded not guilty to the indictment (R. 111, 226, 453) and his bail was fixed at $25,000, in default of which he was delivered to the Federal House of Detention in New York City (R. 111). Upon examination there he was found to be in "good health," though having a mild anemia, and did not require hospitalization (R. 291-292).

On July 17, 1942, after petitioner had failed to answer, a default judgment was entered against him in the denaturalization proceeding (R. 10-12, 111-112). Petitioner had read the denaturalization complaint at the time it was served upon him and he knew that he had 60 days to answer (R. 158). The summons warned him that if he did not answer within that time "judgment by default [would] be taken against [him] for the relief demanded in the complaint" (R. 3-4). He was "always thinking of that day" when his time would expire (R. 216-217), and he realized when

he was arrested on July 7 that "there must have been another week or so for [him] to answer" (R. 200, 225.) Petitioner also testified that he did not know that the default judgment was taken on July 17, but that by September 1942 he knew he had lost his citizenship (R. 201, 226-227, 454).

On July 28, 1942, Attorney McDonald, who had not had any conversation with petitioner before that date, was appointed by the court in New York to defend petitioner and three other defendants (R. 321, 324, 453). In McDonald's opinion, petitioner "seemed in fairly good health," although he did complain of stomach ulcers (R. 323). Petitioner testified that four or five days after he pleaded, in the presence of his co-defendants, when he told McDonald about the denaturalization proceeding in New Jersey and that McDonald should look into it, McDonald "promised [him] that he would do so, and [he] shouldn't worry and shouldn't get so much excited" (R. 168-169).[1] McDonald testified, on the other hand, that petitioner told him that he was in default in the denaturalization proceeding and that "the date had already passed" (R. 325, 454). McDonald denied that petitioner had ever asked him to do anything in the denaturalization case and denied that he ever promised petitioner that he "would take any action whatsoever with regard to the denaturalization action" (R. 324).

---

[1] Petitioner's plea was entered on July 9, 1942 (R. 111).

Petitioner was convicted in the New York case and on October 21, 1942, he was sentenced to five years' imprisonment. Notice of appeal was filed on October 23, 1942. (R. 112, 172, 448-449.) Meanwhile, with the exception of about one week when he was held in Tombs Prison in New York, he was confined at the Federal House of Detention (R. 167, 351-352). During his incarceration there he and other Bundist prisoners were segregated from other inmates because of the war feeling against Germany (R. 338-339); he had sixteen visits by attorneys—fourteen by McDonald and two by other attorneys (R. 340-341, 353, 356-357); he wrote letters to three federal judges (R. 355, 358); he was not an in-patient in the hospital at any time (R. 353); and he started to do maintenance work as a carpenter and tile-setter a few weeks after his admission (R. 174, 355, 358-359, 362-363, 365, 457).

On June 12, 1943, after having elected to begin serving his five-year sentence, petitioner was transferred to the Federal Correctional Institution at Milan, Michigan, where he remained until January 24, 1944 (R. 113, 449-450). While at Milan he was not limited in writing letters to or receiving visits by attorneys (R. 370, 372, 377); he and other Bundist prisoners were segregated from other inmates except at work because of the war (R. 175, 176-177, 369, 370); he worked regularly with the exception of 3½ days (R. 371); he called once at the hospital because of a swollen knee, and

was on a diet for ulcers (R. 372, 376); and his work, which he began 12 days after his admission, consisted of setting tile in the culinary department (R. 371, 374, 375-376, 457).

In January 1944, petitioner was transferred to the jail in Washington, D. C., where he was a defendant in the so-called sedition case, *United States* v. *McWilliams et al.* (R. 113, 379, 450). He was represented by appointed counsel in this case (R. 450). During his confinement in the Washington jail he was visited by a number of attorneys and permitted to confer with them (R. 380, 384-385). He was in the jail infirmary only 23 times during a period of approximately three years (R. 381-382) and did general maintenance work, such as carpentry and bricklaying (R. 381, 384, 457).

On November 29, 1944, the sedition case ended in a mistrial due to the death of the presiding judge (R. 113, 450). On January 11, 1945, while petitioner was still confined in the Washington jail, a writ of habeas corpus was issued out of the District Court for the District of Columbia on his petition. He was represented by counsel in this proceeding. (R. 114, 241, 261, 450.) [2] Also during his confinement in Washington, petitioner was one of a group of 159 persons in whose behalf the Citizens Protective League unsuccessfully sought an injunction against deportation (*Citizens Protective League*

[2] The record does not show the ultimate disposition of this proceeding.

v. *Clark,* 155 F. 2d 290 (C.A.D.C.), certiorari denied, 329 U.S. 787) (R. 113, 450). On November 22, 1946, the sedition case was dismissed by the district court on motion of the defendants (R. 113, 450; 69 F. Supp. 812, affirmed, 163 F. 2d 695 (C.A.D.C.)).

On December 6, 1946, petitioner was transferred to Ellis Island, where he worked as a mason (R. 113, 390-391, 450, 461).[3] While confined there he was permitted legal and social visitors, and could write as many letters to attorneys as he wished. On January 29, 1947, he was allowed to go to his home to procure certain documents relating to his case, and on April 30, 1947, he was paroled (R. 391).

At the conclusion of the hearing the District Court made detailed findings of the subsidiary and ultimate facts (R. 445-461), including the following:

> 27. While living at Camp Nordland and on the 15th of May, 1942, petitioner was served with summons and complaint in the above-mentioned proceedings. The allegations of paragraph 4 of the petition that, "In view of his poor physical condition, petitioner was unable to get around very well and since he was also in very poor financial condition petitioner had no money with which to retain a lawyer to represent him," are false. Plaintiff's health was steadily improving. He had been em-

[3] On June 11, 1945, this Court had reversed the convictions in the New York case. *Keegan* v. *United States,* 325 U.S. 478.

ployed in New York for a considerable length of time before his illness. He is more than ordinarily intelligent. He was an editorial writer on a newspaper. He was a leader and lecturer in various organizations. He owned a station wagon, which he drove 40 miles to New York City on June 9, 1942, stayed overnight in New York, took the train the following day to Hartford, Connecticut, where he testified before a Grand Jury in response to a United States subpoena served on him. The United States Marshal advanced him $10.00 to pay the expense of this trip. He returned to New York, spending another night there, and then drove his station wagon back to Camp Nordland the next day. Prior to July 7, 1942, he sold the station wagon for $200.00.

28. The petition alleges in paragraph 4, "In order to obtain some legal assistance, petitioner wrote out and addressed a letter to the American Civil Liberties Union of New York, in which he explained that he had no money with which to retain a lawyer and requested that they arrange for some legal assistance for him. This letter was in petitioner's possession on the day of his arrest and was taken away from him by the Federal Bureau of Investigation, and so far as petitioner knows, it was never mailed and is undoubtedly in the hands of the United States Department of Justice. Petitioner had also drawn up a draft of an answer to the complaint and was working on it at the time of his arrest, but because of the fact that he was taken into custody, petitioner was unable to complete it and it was

left at petitioner's home when he was taken away." These allegations, upon conflicting testimony and considering all the surrounding circumstances, I find to be false. At the time defendant surrended to the two F.B.I. Agents on July 7, 1942, at Camp Nordland, for removal to the New York District Court, defendant voluntarily signed a document authorizing these agents to search his premises and take therefrom any letters or papers they desired. Such a search was made in the presence of defendant, and three letters were seized, namely, envelopes addressed to defendant postmarked, respectively, Chicago, January 28, 1942; Milwaukee, January 28, 1942; and Milwaukee, January 15, 1942. Each of these envelopes contained a letter written in the German language. No other letters, papers, or documents were seized. For many years after judgment herein, defendant made no mention of any letter to the American Civil Liberties Union or partial answer to the complaint, and these F.B.I. Agents neither saw nor seized any such documents at the time of this search and seizure on July 7, 1942. The defendant's story of the existence of these documents and their disposition is not worthy of belief.

29. Defendant was arraigned in the United States District Court for the Southern District of New York on July 9, 1942, in the so-called "Selective Service Case," at which time he pleaded not guilty. Edward W. McDonald, a New York Attorney, was appointed by the court on July 28, 1942, to defend this defend-

ant and three others in that case. This attorney had neither known nor spoken to defendant prior to such appointment. He represented defendant throughout the four or five weeks trial, consulted with him for the month between appointment and trial at the Federal House of Detention where defendant was kept, consulted with him at the trial, during recesses, and, outside of court hours, at the Federal House of Detention. Mr. McDonald has since become an Assistant United States Attorney in New York, and, more latterly, a United States Commissioner there. He has never been admitted to practice in any New Jersey Court. Some time after July 28, 1942, during the course of a consultation Mr. McDonald had relative to that case with defendant Klapprott and another defendant whom he was assigned to represent, defendant Klapprott mentioned his denaturalization case and stated that his time to answer had expired. Mr. McDonald told the defendant, in effect, that he could not undertake any responsibility in connection with the denaturalization case. At the time of Mr. McDonald's first contact with defendant, the default judgment of denaturalization had been ordered eleven days previously in New Jersey. Accordingly, I find as false petitioner's allegation in paragraph 5 of his petition that, "This attorney promised to look into the matter, but petitioner later found out that instead of doing so, he neglected the matter entirely and permitted the judgment to be entered against petitioner by default, after having, by his promises, lulled

petitioner into a sense of security with respect to this matter." (R. 451-454.)

* * * * *

32. On several different occasions between the time of service of the summons and complaint herein on May 15, 1942, and the time of defendant's arraignment on the New York removal warrant on July 7, 1942, defendant stated that he did not intend to defend the denaturalization case. Of particular significance was one of such occasions, June 27, 1942, when the two F.B.I. Agents visited defendant at Camp Nordland for the express purpose of ascertaining whether or not he intended to contest the denaturalization case and also of discussing with him the matter of his loyalty or disloyalty to the United States. One of these agents, Baumeister, testified at the time of hearing for entry of default judgment herein. Taking into consideration all of the circumstances as shown by the evidence adduced at this present hearing, I find defendant's allegation, in paragraph 9 of his petition, that he did not intend to permit this matter to go by default, is false. His intention to contest this denaturalization case was first formulated years after the judgment was entered. (R. 455.)

* * * * *

34. The physical condition of the defendant between May 15, 1942 and the date upon which default judgment was entered against him, to wit: July 17, 1942, did not prevent him from entering a defense to the action and was not

of a nature or degree such as would excuse him from so defending. (R. 455-456.)

* * * * *

36. Between July 7, 1942 and the date default judgment was entered on July 17, 1942, the defendant was not prevented by any person or officer of the Federal Government from applying to any court, attorney, or other person for assistance in defending himself in this action.

37. Throughout the confinement of the defendant, from July 7, 1942 until and including the date upon which his petition for relief was filed herein * * * the defendant was at all times permitted to communicate with persons and attorneys and to receive visitors, including the attorneys for any legitimate purpose, concerning the defense or protection or the institution of actions to protect his legal rights.

38. During such period of time, the defendant conferred with several different attorneys in New York City and at Washington, D. C. in connection with the cases in which they represented him * * *. In the course of all such proceedings, the defendant conferred with the attorneys who represented him in the various actions mentioned above and on the appeals in such actions, freely and without restriction. (R. 456-458.)

* * * * *

55. The defendant, Klapprott, knowingly, voluntarily, and intentionally failed to de-

> fend the above-entitled action at all times up to the date of the default judgment, and for many years thereafter. (R. 461.)

The District Court concluded that (R. 461-462):

> 1. Where, as here, it appears that the essential allegations of a petition filed four and one-half years after entry of a default judgment of denaturalization, seeking to have such judgment vacated, such allegations being, briefly, that the defendant had intended to defend the action and had taken some steps to accomplish this purpose but was prevented from doing so by actions of Government agents, by illness and lack of funds, are false, and that defendant knowingly, voluntarily, and intentionally permitted the entry of default judgment, the defendant has not shown good cause or reason to have the default judgment vacated under any provisions of *Rule* 60 (*b*) as amended, Federal Rules of Civil Procedure, or under the ruling of *Klapprott* v. *U. S.*, 335 U.S. 478.

The petition to vacate the judgment of denaturalization was accordingly denied (R. 462).

On appeal, petitioner attacked the findings quoted above and claimed that the District Court erred in not finding that the New York prosecution and his incarceration had so preoccupied his mind and so undermined him physically and mentally that he was not guilty of negligence in failing to defend the complaint for denaturalization. The Court of Appeals, after a careful review of

the evidence, held that it amply supported the findings (R. 482-491) and accordingly affirmed the order of the District Court (R. 492).

ARGUMENT

1. In the main, the petition is merely a reiteration of petitioner's contentions below as to the sufficiency of the evidence to support the District Court's findings that the allegations upon which he predicated his plea for relief from the default judgment were false. But the findings may not be set aside unless they are "clearly erroneous," Rule 52(a), F.R. Civil P., i.e., unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U.S. 364, 395; see also *United States* v. *Real Estate Boards*, 339 U.S. 485, 495-496. And in this Court concurrent findings of two courts below are final "in the absence of very exceptional showing of error." *Comstock* v. *Group of Investors*, 335 U.S. 211, 213-214; see also *Allen* v. *Trust Co.*, 326 U.S. 630, 636; *United States* v. *O'Donnell*, 303 U.S. 501, 508.

The summary of the evidence set forth above and in the opinion below shows the poverty of petitioner's attack upon the findings. We think it unnecessary further to argue the evidence. It shows beyond doubt that petitioner, with full knowledge of his rights and that a default judgment would be taken against him if he did not answer the com-

plaint within 60 days, had deliberately chosen to give up his citizenship; that his arrest and incarceration under the New York indictment one week before the expiration of his time to answer in no wise affected his decision;[4] and that the allegations of his petition for relief from the judgment, made for the first time more than four years after its entry and after he had been in contact with numerous attorneys, were false.

As the Court of Appeals stated (R. 488):

> The evidence is convincing that Klapprott, after he had been served in the denaturalization proceeding and prior to July 14, 1942, when default judgment was taken against him therein, thoroughly understood the nature of the proceeding against him and that he voluntarily abstained from appearing in the matter during the sixty day statutory period allowed for appearance after service of the summons and complaint upon him. It is clear that thereafter and until on or about the time the present petition was filed on January 7, 1947, appellant did nothing affirmative in connection with attempting to reopen the default judgment entered on July 14, 1942, despite the

[4] He told one of the arresting agents on July 7, 1942, that he "had no intention of defending himself in this denaturalization proceeding * * * and wasn't interested in defending himself in any way" (R. 300-301). He had made similar statements twice previously, after the complaint had been served on him (see pp. 8, 9-10, *supra*). And in his conversations with McDonald, his appointed attorney in the New York case, in the latter part of July, after his time to answer had expired, he did not request assistance in connection with the denaturalization proceeding, but only advised McDonald that he had defaulted (R. 324-325).

> fact that throughout those years he was in no way prevented from taking any proper steps in that connection if he had so desired. * * *

2. Petitioner's claim of error (Pet. 40-42) in the admission of evidence, largely on his cross-examination, as to his political views and Bund activities is equally without merit. Petitioner's credibility was the crucial issue and the courts below were right in holding that such evidence was relevant as bearing upon his "credibility, his education, training, character and ability" (R. 490; see also R. 208).

CONCLUSION

Petitioner's contentions as to the sufficiency of the evidence to support the District Court's findings merit no further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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